

Aiming at the Wrong Target: The “Audience Targeting” Test for Personal Jurisdiction in Internet Defamation Cases

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In Young v. New Haven Advocate, 315 F.3d 256 (4th Cir. 2002), the Fourth Circuit crafted a jurisdictional test for Internet defamation that requires the plaintiff to show that the defendant specifically targeted an audience in the forum state for the state to exercise jurisdiction. This test relies on the presumption that the Internet—which is accessible everywhere—is targeted nowhere; it strongly protects foreign libel defendants who have published on the Internet from being sued outside of their home states. Other courts, including the North Carolina Court of Appeals, have since adopted or applied the test. The jurisdictional safe harbor (ironically) provided by the very ubiquity of the Internet is no doubt welcomed by media defendants and frequent Internet publishers (e.g., bloggers) whose use of the Internet exposes them to potentially nationwide jurisdiction for defamation. But it may go too far in protecting libel defendants from facing the consequences of their false and injurious statements. For every libel defendant insulated from jurisdiction in a remote location, there is also a libel plaintiff who has potentially been denied an effective remedy in a convenient location. This Article argues that the jurisdictional test created in Young is flawed and particularly should not be applied to libel defendants. It concludes with a simple suggestion: that the appropriate test for personal jurisdiction over libel defendants in cases of Internet defamation is the standard minimum contacts analysis.

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I. INTRODUCTION

The Internet is an incredibly powerful medium for publishing information—including libel. With a few keystrokes, I can publish an injurious falsehood accessible to anyone in the world with an Internet connection and the desire to read it. Even better, my use of the Internet helps to insulate me from having to defend against a defamation lawsuit in a foreign jurisdiction (even though I know that my libel will be accessible there).¹ By broadcasting my libel to the world at large through the Internet, the victim of my libel will have a more difficult time convincing a court that I intended to target him in his home state. Genius!

This Article discusses and critiques the jurisdictional safe harbor for defamation defendants who publish on the Internet. In a 2002 case, *Young v. New Haven Advocate*,² the Fourth Circuit crafted a jurisdictional test for Internet defamation that requires the plaintiff to show that the defendant specifically targeted an *audience* in the forum state for that state to exercise jurisdiction.³ This test relies on the presumption that the Internet—which is accessible everywhere—is targeted nowhere; it strongly protects foreign libel defendants who have published on the Internet from being sued outside of their home states.⁴ Other courts, including the North Carolina Court of Appeals, have

¹ This Article uses the term “foreign” to refer to defendants and courts located in states other than the plaintiff’s home state. In this context, the term does not refer to defendants and courts located in countries other than the United States.

² *Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002).

³ *Id.* at 258–59.

⁴ At least seven libel defendants have successfully avoided defending themselves in foreign jurisdictions in the Fourth Circuit due in part to the safe harbor provided by *Young*. See, e.g., *Jackson v. Michalski*, No. 3:10-cv-00052, 2011 WL 3679143, at *5–6 (W.D. Va. Aug. 22, 2011); *Knight v. Doe*, No. 1:10-cv-887, 2011 WL 2471543, at *2–4 (E.D. Va. June 21, 2011); *Dutcher v. Eastburn*, No. 5:10-CV-210-FL, 2011 WL 1134666, at *4 (E.D.N.C. Mar. 26, 2011); *Galustian v. Peter*, 750 F. Supp. 2d 670, 675 (E.D. Va. 2010); *Diagnostic Devices, Inc. v. Pharma Supply, Inc.*, No. 3:08-cv-149-RJC-DSC, 2009 WL 3633888, at *9–10 (W.D.N.C. Oct. 30, 2009); *Williams v. Adver. Sex LLC*, No. 1:05CV51, 2009 WL 723168, at *8–9 (N.D. W. Va. Mar. 17, 2009), *rev’d on other grounds*, 410 F. App’x 578 (4th Cir. 2011); *Burleson v. Toback*, 391 F. Supp. 2d 401, 415–16 (M.D.N.C. 2005); see also *Dring v. Sullivan*, 423 F. Supp. 2d 540, 548–49 (D. Md. 2006) (finding no basis for

since adopted or applied the test.⁵

The jurisdictional safe harbor (ironically) provided by the very ubiquity of the Internet is no doubt welcomed by media defendants and frequent Internet publishers (e.g., bloggers) whose use of the Internet exposes them to potentially nationwide jurisdiction for defamation. But does it go too far in protecting libel defendants from facing the consequences of their false and injurious statements? For every libel defendant insulated from jurisdiction in a remote location, there is also a libel plaintiff who has potentially been denied an effective remedy in a convenient location. And it will be small comfort to the plaintiff that the defendant did not “target” her libel at an audience in the plaintiff’s home state; the libel was still accessible there and to the rest of the world.

This Article argues that the Fourth Circuit’s test is flawed and in particular should not apply to libel cases.⁶ Part II discusses the background of *Young*, including a discussion of the seminal libel jurisdiction case, *Calder v. Jones*.⁷ The *Young* test shifts the focus of the *Calder* “effects” test from the effect of the libel on the plaintiff in his home state to whether the defendant intended to target readers in the plaintiff’s home state; this section argues that to reduce the jurisdictional inquiry to essentially one factor is not only inconsistent with *Calder* but also with the whole of modern jurisdictional analysis (of which *Calder* is a part).

Part III critiques the reasoning in *Young*, which relies on a misguided presumption and concerns about the Internet, and argues that the prevailing “minimum contacts” analysis is more than adequate to protect against the perceived dangers of the Internet (specifically, the fears that the ubiquity of the Internet will create jurisdictional overexposure for libel defendants and eviscerate notions of state sovereignty). This section also addresses concerns that minimum contacts analysis does not adequately protect the First Amendment freedoms of libel defendants, particularly individuals who publish on the Internet.

Finally, this Article concludes with a simple suggestion: that the appropriate test for personal jurisdiction over libel defendants in cases of Internet defamation is the standard minimum contacts analysis. The Fourth Circuit (and the courts that have followed it) should reconsider *Young* and instead use audience targeting as *one factor among many* in its jurisdictional analysis.

long-arm jurisdiction over defendant and opining that minimum contacts were doubtful based on targeting analysis).

⁵Dailey v. Popma, 662 S.E.2d 12, 18 (N.C. Ct. App. 2008); see also *infra* text accompanying notes 156–57.

⁶This Article does not dispute that some form of the targeting test could be a useful tool for jurisdictional analysis in some cases. See generally Michael A. Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 16 BERKELEY TECH. L.J. 1345, 1380–1404 (2001) (advocating for the targeting test in cases involving Internet commerce).

⁷*Calder v. Jones*, 465 U.S. 783 (1984).

Additionally, state legislatures should consider crafting a statutory approach to personal jurisdiction in cases involving Internet defamation and address the concern that substantive libel law may not adequately protect the speech rights of some Internet publishers.

II. BACKGROUND: HOW *YOUNG* RESTRICTS *CALDER*

Much of the confusion (and innovation) in cases involving Internet libel can be traced to the lack of clarity in a key pre-Internet case, *Calder v. Jones*. *Calder* is viewed by some lower courts as creating a three-part “effects” test for personal jurisdiction in cases involving intentional torts:

(1) the defendant committed an intentional tort; (2) the plaintiff felt the brunt of the harm in the forum, such that the forum can be said to be the focal point of the harm; and (3) the defendant expressly aimed his tortious conduct at the forum, such that the forum can be said to be the focal point of the tortious activity.⁸

In *Young*, the Fourth Circuit adapted the three-part effects test to the Internet context by focusing on a single inquiry: “[W]hether the [defendants] manifested an intent to direct their website content—which included certain articles discussing conditions in a Virginia prison—to a Virginia audience.”⁹ The *Young* test essentially eliminates the other concerns of the effects test—most notably factor two, the effect of the defamation on the plaintiff—and examines solely whether the defendant targeted its message to an audience in the plaintiff’s home state. The shift in inquiry from effects on the plaintiff to the target audience of the libel can be explained in part by the confusion surrounding *Calder* and in part by the Fourth Circuit’s concern that the Internet has the potential to create limitless jurisdiction over libel defendants.

⁸ *Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 398 n.7 (4th Cir. 2003); *see IMO Indus., Inc. v. Kiekert AG*, 155 F.3d 254, 265–66 (3d Cir. 1998); *Griffis v. Luban*, 646 N.W.2d 527, 534 (Minn. 2002). Other courts have phrased the test slightly differently. *See, e.g., Tamburo v. Dworkin*, 601 F.3d 693, 703 (7th Cir. 2010) (requiring “(1) intentional conduct (or ‘intentional and allegedly tortious’ conduct); (2) expressly aimed at the forum state; (3) with the defendant’s knowledge that the effects would be felt—that is the plaintiff would be injured—in the forum state” (quoting *Calder*, 465 U.S. at 789)); *Bancroft & Masters, Inc. v. Augusta Nat’l Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000) (requiring the defendant to have “(1) committed an intentional act, which was (2) expressly aimed at the forum state, and (3) caused harm, the brunt of which is suffered and which the defendant knows is likely to be suffered in the forum state”); *Capital Promotions, L.L.C. v. Don King Prods., Inc.*, 756 N.W.2d 828, 837 (Iowa 2008) (requiring that “(1) the defendant’s acts were intentional; (2) these actions were uniquely or expressly aimed at the forum state; and (3) the brunt of the harm was suffered in the forum state, and the defendant knew the harm was likely to be suffered there”).

⁹ *Young v. New Haven Advocate*, 315 F.3d 256, 263 (4th Cir. 2002) (emphasis added).

This section discusses *Calder*, arguing that the effects test should not be reduced to a three-factor analysis but rather viewed as wholly consistent with the principles of modern personal jurisdiction. It also argues that *Young* was misguided in shrinking the jurisdictional analysis in libel cases to a focus on the target audience of the libel rather than the totality of the defendant's contacts with the forum state.

A. Understanding Calder

The purpose of this Article is not to attempt a complete decoding of *Calder v. Jones*, which has mystified courts and commentators alike since 1984.¹⁰ But, it is worth revisiting the opinion to establish one key point: *Calder* should be viewed as a case in harmony with modern minimum contacts analysis, rather than a three-part (much less one-part) test for intentional torts.

In *Calder v. Jones*, TV star Shirley Jones and her husband, Marty Ingels, sued the *National Enquirer*, its local distributor, John South (the reporter who wrote the offending article), and Iain Calder (the president and editor of the *Enquirer*), in California state court.¹¹ South and Calder were Florida residents who had few contacts with California.¹² South had telephoned the state while writing the article and had traveled there several times for business; Calder had

¹⁰ See, e.g., *Tamburo*, 601 F.3d at 704–08 (noting circuit splits and variations in stating and applying the effects test); *United States v. Swiss Am. Bank, Ltd.*, 274 F.3d 610, 624 n.7 (1st Cir. 2001) (noting disagreements among several circuits in interpreting *Calder*); *Baldwin v. Fischer-Smith*, 315 S.W.3d 389, 394–95 (Mo. Ct. App. 2010) (describing three different judicial views of the “express aiming” requirement of *Calder*); Patrick J. Borchers, *Internet Libel: The Consequences of a Non-Rule Approach to Personal Jurisdiction*, 98 NW. U. L. REV. 473, 488–89 (2004) (describing the difficulty courts have had applying *Calder* in Internet libel cases); C. Douglas Floyd & Shima Baradaran-Robison, *Toward a Unified Test of Personal Jurisdiction in an Era of Widely Diffused Wrongs: The Relevance of Purpose and Effects*, 81 IND. L.J. 601, 618–21 (2006) (discussing the confusion surrounding the meaning of the “express aiming” or “intentional targeting requirement” of the *Calder* test); Andrew F. Halaby, *You Won't Be Back: Making Sense of “Express Aiming” After Schwarzenegger v. Fred Martin Motor Co.*, 37 ARIZ. ST. L.J. 625, 625 (2005) (arguing for the need to clarify the “express aiming” element of the *Calder* “effects test” for specific personal jurisdiction); Denis T. Rice & Julia Gladstone, *An Assessment of the Effects Test in Determining Personal Jurisdiction in Cyberspace*, 58 BUS. LAW. 601, 603, 652–53 (2003) (concluding that “diverse pre-Internet interpretations of the effects test” have resulted in inconsistent application of the test in Internet cases); Teresa J. Cassidy, Case Note, *Effects of the “Effects Test”: Problems of Personal Jurisdiction and the Internet*; *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063 (10th Cir. 2008), 9 WYO. L. REV. 575, 590–94 (2009) (discussing the difficulties of anticipating the outcomes of the “effects test” in the Tenth Circuit due to inherent ambiguities in the test and inconsistent application by the courts); Scott T. Jansen, Comment, *Oh, What a Tangled Web . . . the Continuing Evolution of Personal Jurisdiction Derived from Internet-Based Contacts*, 71 MO. L. REV. 177, 183–85 (2006) (characterizing the application of the *Calder* “effects” test and the *Zippo* test in the federal circuit courts as “neither . . . entirely inconsistent nor exactly uniform”).

¹¹ *Calder*, 465 U.S. at 784–86.

¹² *Id.* at 785–86.

visited California twice for unrelated reasons.¹³ The *Enquirer* and its distributor appeared in the case, but South and Calder challenged personal jurisdiction.¹⁴

The Supreme Court upheld jurisdiction over South and Calder based on the “effects” of the defendants’ conduct in Florida on the plaintiffs in California: “The article was drawn from California sources, and the brunt of the harm, in terms both of respondent’s emotional distress and the injury to her professional reputation, was suffered in California. In sum, California is the focal point both of the story and of the harm suffered.”¹⁵ The Court went on to note that the defendants had not been charged with “mere untargeted negligence.”¹⁶ Instead, they had written and edited an article “that they knew would have a potentially devastating impact” on Jones, and that the injury would be felt in the state where “she lives and works” (Hollywood being located in California) “and in which the National Enquirer has its largest circulation.”¹⁷ Under these circumstances, Calder and South could “reasonably anticipate being haled into court” in California.¹⁸

The Court did not elaborate on the framework of its analysis (much less announce the three-part test that later decisions have distilled from *Calder*), but clues to the Court’s method can be inferred from the sources it cited. Most significantly, the Court relied on its landmark twentieth-century personal jurisdiction cases, including *International Shoe Co. v. Washington*,¹⁹ *Shaffer v. Heitner*,²⁰ and *World-Wide Volkswagen Corp. v. Woodson*.²¹ Those cases held that a state may exercise jurisdiction over a non-resident defendant only if the defendant has “minimum contacts” with the forum state.²² The contacts serve two functions: to preserve limits on state sovereignty and to ensure that the state’s exercise of jurisdiction is fair to the defendant.²³ The Court in *World-Wide Volkswagen* engaged in an extensive discussion of foreseeability, which functions as a sort of proxy for fairness in modern jurisdictional analysis. The Court emphasized that the “mere likelihood that a product will find its way into the forum State” is not an adequate gauge of whether the defendant could have anticipated a lawsuit in that state.²⁴ Rather, “the defendant’s conduct and connection with the forum State” must be such that “he should reasonably anticipate being haled into court there.”²⁵ Foreseeability thus gives a “degree of

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 788–89.

¹⁶ *Id.* at 789.

¹⁷ *Calder*, 465 U.S. at 789–90.

¹⁸ *Id.* at 790.

¹⁹ *Int’l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

²⁰ *Shaffer v. Heitner*, 433 U.S. 186 (1977).

²¹ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

²² *Id.* at 291; *Shaffer*, 433 U.S. at 203; *Int’l Shoe*, 326 U.S. at 316.

²³ *World-Wide Volkswagen*, 444 U.S. 291–92.

²⁴ *Id.* at 297.

²⁵ *Id.*

predictability” to the operation of the legal system, allowing potential defendants “to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.”²⁶

The citations in *Calder to International Shoe*, *Shaffer*, and *World-Wide Volkswagen* suggest, at a minimum, that *Calder* was intended to be consistent with these cases, rather than breaking entirely new ground. This conclusion is supported by the Court’s emphasis on foreseeability and purposeful behavior (the hallmarks of modern jurisdictional analysis) in its ultimate conclusion that the defendants could reasonably foresee being haled into court in California, given their purposeful behavior regarding Jones, whom they knew to live and work in California.²⁷ Further, the Court cited Section 37 of the Restatement (Second) of Conflict of Laws,²⁸ which essentially restates the High Court’s minimum contacts analysis, suggesting that a sensitive analysis of the totality of the libel defendant’s contacts with the forum state, including their quality and nature, the defendant’s intent, and the foreseeability of causing harm in a particular jurisdiction, is crucial to determining whether jurisdiction is appropriate.

Additional support for the theory that *Calder* is consistent with minimum contacts analysis comes from the cases cited in Jones’s successful brief to the Supreme Court, advocating for the “effects doctrine.”²⁹ First, Jones’s brief argues that the “effects doctrine” is entirely consistent with the due process principles in *International Shoe* and *World-Wide Volkswagen*, among other cases.³⁰ Second, the brief argues in favor of the multi-factor approach to analyzing jurisdiction over foreign libel defendants adopted previously by lower courts.³¹ For example, in *Church of Scientology of California v. Adams* (a case cited in the Jones brief), the Ninth Circuit employed the effects doctrine to deny personal jurisdiction in California over the Pulitzer Publishing Company.³² The *St. Louis Post-Dispatch* had published a series of articles critical of the Missouri Church of Scientology and Scientology in general; the articles had not mentioned the California Church, yet 156 copies of the offending articles had been circulated in California.³³ The court rejected the argument that the “likelihood that an offending publication will enter a forum” is by itself a fair

²⁶ *Id.*

²⁷ See *Calder v. Jones*, 465 U.S. 783, 788–90 (1984) (noting that jurisdiction is appropriate when a corporation makes a deliberate effort to serve a particular market); see also *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (noting that the “fair warning” required by the Due Process Clause “is satisfied if the defendant has ‘purposefully directed’ his activities at residents of the forum” (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984))).

²⁸ *Calder*, 465 U.S. at 789.

²⁹ Brief for Appellee, *Calder*, 465 U.S. 783 (No. 82-1401), 1983 U.S. S. Ct. Briefs LEXIS 219, at *48–64.

³⁰ *Id.* at *50–60.

³¹ *Id.* at *60–63.

³² *Church of Scientology of Cal. v. Adams*, 584 F.2d 893, 899 (9th Cir. 1978).

³³ *Id.* at 895–96.

measure of the reasonableness of exercising jurisdiction over a publisher.³⁴ Instead, it examined multiple factors bearing on the foreseeability of the effect (the risk of causing injury by defamation in the forum state).³⁵ These factors included the subject matter of the article, whether it specifically mentioned California residents or corporations, whether the reporters conducted research in California, and whether California readers were the primary intended audience of the article.³⁶ Given that *none* of these factors were present, the Ninth Circuit found that the jurisdiction would be unreasonable.³⁷

But *Calder* is such a cryptic opinion that the aspects of the opinion that incorporate minimum contacts analysis do not fully prove that *Calder* follows a modern jurisdictional framework. For example, despite relying on *World-Wide Volkswagen*, the Court did not engage in a systematic inquiry into the constitutional reasonableness of asserting jurisdiction over *Calder* and South—the second part of the jurisdictional framework established by that case.³⁸ It can be presumed from the outcome in *Calder* that the Court considered California's exercise of jurisdiction not to violate the Due Process Clause, but the absence of the reasonableness inquiry raises the question whether the Court considered it unnecessary in that context, reinforcing the perception that the *Calder* effects test stands apart from modern jurisdictional analysis.³⁹

In addition, the broad citation in *Calder* to Section 37 of the Restatement (Second) of Conflict of Laws could be seen as endorsing a “bright line” test for personal jurisdiction in cases of intentional torts.⁴⁰ Section 37 describes the personal jurisdiction analysis in several typical situations involving foreign defendants and intentional injuries, including: “(1) the act was done with the intention of causing the particular effects in the state” and “(2) the act, although

³⁴ *Id.* at 897.

³⁵ *Id.* at 897–98.

³⁶ *Id.* at 898.

³⁷ *Id.* at 898–99.

³⁸ This inquiry would have involved considering the factors outlined in *World-Wide Volkswagen*, including the burden on the defendants of litigating in a distant forum, the interest of the forum state in adjudicating the suit, the interest of the plaintiffs in obtaining convenient and effective relief, the interest of the interstate judicial system in efficient resolution of controversies, and the interest of the states in furthering substantive social policies. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

³⁹ In *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), decided the same day as *Calder*, the Court similarly cited to *World-Wide Volkswagen* but did not engage in its own independent balancing analysis after finding that the defendant had minimum contacts with the forum state. *Id.* at 774–75. Instead, the Court rejected the conclusion of the court of appeals that it would be unfair to subject *Hustler* to jurisdiction in New Hampshire. *Id.* at 775 (“We think that the three concerns advanced by the Court of Appeals, whether considered singly or together, are not sufficiently weighty to merit a different result. The ‘single publication rule,’ New Hampshire’s unusually long statute of limitations, and plaintiff’s lack of contacts with the forum State do not defeat jurisdiction otherwise proper under both New Hampshire law and the Due Process Clause.”).

⁴⁰ See Rice & Gladstone, *supra* note 10, at 608–13 (describing the evolution of the “Strict Effects Test” and the “Soft Effects Test” in the federal courts of appeal).

not done with the intention of causing effects in the state, could reasonably have been expected to do so.”⁴¹ The first situation is exemplified by the defendant “who intentionally hits the plaintiff in state *X* with a bullet shot from state *Y*”; clearly, that defendant will be subject to the jurisdiction of state *X* regarding claims arising from the injury.⁴² If type 1 scenarios include defamation, as some courts and commentators believe,⁴³ the jurisdictional analysis would indeed rely on few factors and might reasonably be reduced to a three-part test that differs from the searching inquiry into contacts mandated by *International Shoe* and *World-Wide Volkswagen*.

But in scenarios involving the Restatement’s second example, there will be no personal jurisdiction over the defendant unless circumstances indicate that the effect in the foreign state was “somewhat more than merely foreseeable,” as when noxious fumes from a factory in state *X* drift to state *Y*, causing injury there, or where the defendant has contacts in addition to the foreseeable effects that support jurisdiction.⁴⁴ Type 2 scenarios result in a jurisdictional analysis that looks at the totality of the defendant’s contacts with the forum state—i.e., minimum contacts analysis. If type 2 scenarios include defamation, the jurisdictional analysis will require a more searching analysis of the defendant’s contacts with the forum state and essentially consists of minimum contacts analysis. Consistent with the type 2 approach, some courts interpret *Calder* as a particular application of the High Court’s minimum contacts analysis to the specific circumstances of libel and other intentional torts and not a fundamentally different approach to the jurisdictional analysis.⁴⁵ Regrettably,

⁴¹ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37 cmt. e (1971).

⁴² *Id.* (italics added).

⁴³ *Buckley v. N.Y. Post Corp.*, 373 F.2d 175, 179 (2d Cir. 1967) (noting that “the publisher [of a libel] directly inflicts damage on the intangible reputation just as the frequently hypothesized but rarely encountered gunman firing across a state line does on the body”); A. Benjamin Spencer, *Jurisdiction and the Internet: Returning to Traditional Principles to Analyze Network-Mediated Contacts*, 2006 U. ILL. L. REV. 71, 102.

⁴⁴ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37 cmt. e.

⁴⁵ See *Revell v. Lidov*, 317 F.3d 467, 473 (5th Cir. 2002) (noting that the effects test “is but one facet of the ordinary minimum contacts analysis, to be considered as part of the full range of the defendant’s contacts with the forum”); *IMO Indus., Inc. v. Kiekert AG*, 155 F.3d 254, 265 (3d Cir. 1998) (noting that *Calder* did not “carve out a special intentional torts exception to the traditional specific jurisdiction analysis”); *Noonan v. Winston Co.*, 135 F.3d 85, 90 (1st Cir. 1998) (applying *Calder* as a means of applying the purposeful availment requirement in *World-Wide Volkswagen*); *Allred v. Moore & Peterson*, 117 F.3d 278, 286 (5th Cir. 1997) (“[T]he effects test is not a substitute for a nonresident’s minimum contacts that demonstrate purposeful availment of the benefits of the forum state.”); *Dakota Indus., Inc. v. Dakota Sportswear, Inc.*, 946 F.2d 1384, 1390–91 (8th Cir. 1991) (stating that “[i]n relying on *Calder*, we do not abandon [our minimum contacts test] . . . [w]e simply note that *Calder* requires the consideration of additional factors when an intentional tort is alleged”); *Wallace v. Herron*, 778 F.2d 391, 395 (7th Cir. 1985) (“[T]he key to *Calder* is that the effects of an alleged intentional tort are to be assessed as part of the analysis of the defendant’s relevant contacts with the forum.”); ROBERT D. SACK & SANDRA S. BARON, *LIBEL, SLANDER, AND RELATED PROBLEMS* 733 (2d ed. 1994) (noting that “[u]nder standard

the Court in *Calder* did not indicate which of the intentional tort scenarios it perceived as most relevant to a defamation case.

But despite the confusion, the *Calder* analysis stands on firmer constitutional footing if it is grounded within the established parameters of minimum contacts analysis.⁴⁶ The Supreme Court has never indicated that jurisdictional analysis should fundamentally differ depending on the type of injury alleged or the cause of action in the complaint. Nor has it given any indication (except by omission) that its jurisdictional analysis for intentional torts should stand apart from the analysis for negligent torts, tax evasion, breach of contract, or any other cause of action. Nor in *Calder* did the Court announce a three-part test; in the years since *Calder* was decided, the Court has consistently “rejected the notion that personal jurisdiction might turn on ‘mechanical’ tests” or “talismanic jurisdictional formulas.”⁴⁷

Thus, despite being reduced to a three-part test by many lower courts, it is unlikely that the effects test was intended to be so simple. Instead, the effects test can be seen as entirely consistent with the High Court’s modern approach to personal jurisdiction, requiring a sensitive and comprehensive analysis of the totality of the defendant’s contacts with the forum state, including the nature of the behavior alleged (volitional or not), the likelihood that its harm would be experienced in the forum state, the intervention of random, fortuitous, or unilateral third-party behavior, and whether the effects in the forum state were foreseeable.⁴⁸ As is evident from *Calder*, the factors most relevant to the analysis in a libel case will be the plaintiff’s residence and work place, the defendant’s knowledge of those places and research or other contacts with the forum prior to publishing the libel, the subject matter of the libel, and the method and manner of publication.

Because the *Calder* effects test is as messy and multi-factored as the rest of the High Court’s personal jurisdiction doctrine, efforts to reduce it to a one-factor test are inherently misguided. As an example of misguided one-

due process doctrine, that conduct therefore gave rise to jurisdiction over the defendants in the forum state”).

⁴⁶ Professor Robertson argues that *Calder* should be clarified and drastically limited by forcing plaintiffs to prove their allegations by a preponderance of the evidence before obtaining jurisdiction over a foreign defendant. Practically speaking, this means that a libel plaintiff will rarely be able to sue a foreign defendant in her home state, especially if she sues a media defendant (in which case she would be forced to establish the defendant’s actual malice before having access to discovery). See Cassandra Burke Robertson, *The Inextricable Merits Problem in Personal Jurisdiction*, 45 U.C. DAVIS L. REV. (forthcoming 2012) (manuscript at 52), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1952892 (“The court can no longer assume for jurisdictional purposes that the plaintiff’s allegations of wrongfulness and harm are true; instead, those allegations must be proven by a preponderance of the evidence. . . . [L]eft with two difficult options . . . [the court can] wait[] until trial to resolve the issue of personal jurisdiction[] or narrow[] the effects test to require plaintiffs to sue elsewhere.”).

⁴⁷ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478, 485 (1985).

⁴⁸ See generally *id.* at 472–74 (summarizing the parameters of contacts analysis).

dimensional thinking, some lower courts interpreting *Calder* have emphasized its mention that the *National Enquirer* had its largest circulation in California, presumably construing that circulation as evidence of express aiming at the forum state (one of the “elements” in the three-part version of *Calder*). In *Calder*, however, the Court expressly *declined* to impute control over the circulation of the magazine to its reporter and president— “[p]etitioners are correct that their [activities] are not to be judged according to their employer’s activities [in California]”—and thus the Court did *not* consider evidence of the magazine’s circulation in California as an independent source of contact between the individual defendants and the forum.⁴⁹ Because the magazine’s significant circulation in California was not counted against the individual defendants (the only litigants in the Supreme Court), that circulation could hardly have been the sole or determinative basis for the Court’s decision.⁵⁰ The Fourth Circuit, however, has seized upon the intended audience of the libel—an updated way of describing the circulation of a publication—as the factor of greatest significance in determining whether jurisdiction over a foreign defendant is appropriate.

B. Young Shifts the Test from “Effects” to “Audience Targeting”

The Fourth Circuit in *Young v. New Haven Advocate* used an “audience targeting” test to impose a strict limit on jurisdiction over foreign defendants in libel cases.⁵¹ Stanley Young, a Virginia prison warden, sued two newspapers, the *New Haven Advocate* and the *Hartford Courant*, and several of their editors and reporters, in federal court in Virginia.⁵² The defendants had published articles and blogs on their Web sites sharply critical of Wallens Ridge State Prison in Big Stone Gap, Virginia, where Young was the warden and where Connecticut was temporarily housing some of its prisoners.⁵³ All defendants challenged personal jurisdiction.⁵⁴

⁴⁹ *Calder v. Jones*, 465 U.S. 783, 790 (1984).

⁵⁰ The circulation of the *Enquirer*, of which South, as president of the *Enquirer*, was certainly aware, was relevant to the Court’s determination that the president of the *Enquirer* could have *foreseen* injury to Jones and Ingalls in California. *Id.* at 789–90.

⁵¹ *Young v. New Haven Advocate*, 315 F.3d 256, 263 (4th Cir. 2002).

⁵² *Id.* at 259.

⁵³ One of the offending articles was titled “Welcome to the Confederacy.” Complaint ¶ 6, *Young v. New Haven Advocate*, 184 F. Supp. 2d 498 (W.D. Va. 2001) (No. 2:00CV00086), 2000 WL 35633784, ¶ 6. Regarding Young, the article describes “Civil War paraphernalia in the warden’s office, including a ball and chain and a painting of a battle scene with the Confederate flag, a symbol of Southerners who wanted to uphold the institution of slavery.” Camille Jackson, *Welcome to the Confederacy: Virginia Horror Stories Build Pressure to Keep Inmates Here*, NEW HAVEN ADVOC. (Mar. 30, 2000), http://web.archive.org/web/20000526063448/http://newmassmedia.com/nac.phtml?code=new&db=nac_fea&ref=10075 (accessed by searching for New Haven Advocate in the Internet Archive index). The article also reports on harsh conditions in the prison: inmates “tell stories of being tied to a bed, spread-eagled naked for 72 hours, lying in their own feces. Of

Young argued for jurisdiction based on the long reach of Internet publications: the defendants—knowing that Young was a Virginia resident and an employee of the state correctional system and knowing that the harm of any defamatory content would be suffered by Young in Virginia—posted defamatory articles on their Web sites, which were accessible to readers in Virginia.⁵⁵ Under a mechanical application of the three-part version of the *Calder* effects test, Virginia would have jurisdiction over the defendants because they had intentionally directed wrongdoing at a Virginia resident, knowing that the brunt of the injury would be felt in Virginia where Young lived and worked (indeed, this is how the district court analyzed the case).⁵⁶ Additional factors counseled in favor of jurisdiction: the defendants could have foreseen, based on the substance of the article, that it might cause injury to Young in Virginia; Young was mentioned by name, as was the prison where he was a warden, as was the location of the prison.⁵⁷ The reporter had made several calls to the state in the course of researching the article.⁵⁸ Under *Calder*, this is likely sufficient volitional contact with the forum state to find jurisdiction over the media defendants.⁵⁹

But the Fourth Circuit did not apply *Calder* to the case. Instead, it crafted a new test that inquires whether the defendants “inten[ded] to direct their website content—which included several articles discussing conditions in a Virginia prison—to a Virginia audience.”⁶⁰ The *Young* test thereby shifted the focus of the jurisdictional inquiry from the plaintiff, whose injury is the linchpin of the analysis in *Calder*, to the intended audience of the defendant’s publication. Essentially, it replaced the nuanced, fact-intensive inquiry of *Calder*—or, if you prefer, the simplified three-part effects test—into a single inquiry: whether the Web site at issue is directed at an *audience* or *readers* within the forum state. If this audience targeting is absent, according to *Young*, the state cannot exercise jurisdiction over the defendant.⁶¹

The test in *Young* is based on the Fourth Circuit’s already narrow test for jurisdiction involving Internet-mediated contacts, which requires evidence that the defendant has “directed” its electronic activity into the state. In a 2002 case, *ALS Scan v. Digital Service Consultants*, the Fourth Circuit “adopt[ed] and adapt[ed] the *Zippo* model” of Web site Internet jurisdiction (which is based on the interactivity of the defendant’s Web site), ruling that:

guards taunting them to fight. . . . The phones are monitored, violating attorney/client privileges. And then there are the racial slurs.” *Id.*

⁵⁴ *Young*, 315 F.3d at 259–60.

⁵⁵ *Id.* at 262.

⁵⁶ *Id.* at 260; *Young*, 184 F. Supp. 2d at 508; Spencer, *supra* note 43, at 101.

⁵⁷ *Young*, 315 F.3d at 259, 262.

⁵⁸ *Id.* at 259.

⁵⁹ As in *Calder* and *Keeton*, the jurisdictional analysis for the media defendant must be conducted separately from the individual defendants.

⁶⁰ *Young*, 315 F.3d at 263 (emphasis added).

⁶¹ Cf. Spencer, *supra* note 43, at 83 (noting that the *ALS Scan* test is “cumulative”).

[A] State may, consistent with due process, exercise judicial power over a person outside of the State when that person (1) directs electronic activity into the State, (2) with the manifested intent of engaging in business or other interactions within the State, and (3) that activity creates, in a person within the State, a potential cause of action cognizable in the State's courts.⁶²

Young adapts the wording of the *ALS Scan* test—directing electronic activity into the state—to better fit the defamation context. Under both approaches, however, the defendant's use of the Internet works to her advantage because the plaintiff must be able to show that the defendant created the Web site deliberately to reach persons or an audience within the forum state.

To justify this requirement of state-specific targeting, the court in *ALS Scan* expressed concern that the Internet had the potential to subject its users to limitless jurisdiction, or jurisdiction in every forum where the offending material can be accessed: “[I]f [a] broad interpretation of [electronically-mediated] minimum contacts were adopted, State jurisdiction over persons would be universal, and notions of limited State sovereignty and personal jurisdiction would be eviscerated.”⁶³ The court's “directing” requirement was thus intended to limit jurisdiction in ways that the court believed minimum contacts analysis does not:

Under [the *ALS Scan*] standard, a person who simply places information on the Internet does not subject himself to jurisdiction in each State into which the electronic signal is transmitted and received. Such passive Internet activity does not generally include directing electronic activity into the State with the manifested intent of engaging business or other interactions in the State⁶⁴

The limit on jurisdiction in the Fourth Circuit test relies (in the words of one commentator) on a “fictitious presumption that Internet activity is targeted nowhere.”⁶⁵ This “presumption of aimlessness”⁶⁶ favors the defendant, as it forces the plaintiff to find evidence other than accessibility of the Web site in the forum state to show specific targeting.

Consistent with *ALS Scan*, the court in *Young* declined to find that the defendants' Web sites provided the additional knowing, targeted contacts sufficient to give Virginia personal jurisdiction over the defendants.⁶⁷ This decision rested in part on the finding that the media defendants were “local”

⁶² *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 714–15 (4th Cir. 2002) (holding that a Georgia-based Internet service provider (ISP), with a Web site accessible in Maryland, was not subject to jurisdiction in Maryland based on copyright-infringing photographs posted on a Web site that it hosted, because the ISP “did not select or knowingly transmit infringing photographs specifically to Maryland”).

⁶³ *Id.* at 713.

⁶⁴ *Id.* at 714.

⁶⁵ Spencer, *supra* note 43, at 88.

⁶⁶ *Id.*

⁶⁷ *Young v. New Haven Advocate*, 315 F.3d 256, 262–63 (4th Cir. 2002).

Connecticut papers, based on the “general thrust and content” of their Web sites (including their advertisements, weather and traffic information, links to state government, and the subject matter of the other articles that appeared on the site).⁶⁸ The court also determined that the offending articles—which mentioned a Virginia resident by name and reported on harsh conditions in the prison that he ran in Virginia—were intended to “encourage[] a public debate in *Connecticut* about whether the transfer policy was sound or practical for *that* state and its citizens.”⁶⁹

In essence, the court determined that the media defendants were “local” Connecticut publications (despite being accessible nationally through the Internet), so the offending articles were targeted solely at and of interest solely to a Connecticut audience (despite mentioning persons, places, and events in Virginia).⁷⁰ The logic of this analysis means that local and regional publications can take advantage of the nationwide scope of the Internet by publishing their content on the Web, but the very ubiquity of the Internet-publishing medium means that they do not target their publication at any particular audience (or forum state) outside of their local readership. These two fictions—the presumption of aimlessness and the paradoxical notion of a “local” Web site—work together to create the jurisdictional safe harbor of *Young*.

C. Tough to Reconcile: *Calder* and *Young*

It is difficult to reconcile the test in *Young* with the test in *Calder*.⁷¹ In *ALS Scan*, the Fourth Circuit described its requirement that a foreign defendant’s electronic activity must be “directed at” and cause injury in the forum state as “not dissimilar” from the effects test in *Calder*.⁷² But the court in *Young* deliberately narrowed from *Calder* the type of targeting that justifies personal jurisdiction.⁷³ *Calder* grounded its finding of specific jurisdiction on the effects

⁶⁸ *Id.* at 263.

⁶⁹ *Id.* at 263–64 (emphasis added).

⁷⁰ *Id.* at 263.

⁷¹ See Borchers, *supra* note 10, at 482–89 (arguing that the targeting approach in libel cases cannot be reconciled with either *Calder* or *Keeton*).

⁷² *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 714 (4th Cir. 2002).

⁷³ *Young* explicitly relied on a Fourth Circuit decision that had purportedly given a narrowing construction to *Calder*. *Young*, 315 F.3d at 262 (citing *ESAB Grp., Inc. v. Centricut, Inc.*, 126 F.3d 617, 625–26 (4th Cir. 1997)). Ironically, the court in *Young* misread its earlier holding. In *ESAB Group*, a case involving misappropriation of trade secrets and other intentional torts (but not libel), the Fourth Circuit initially found that the defendants did not “manifest behavior intentionally targeted at and focused on” the forum state. *ESAB Grp.*, 126 F.3d at 625. Given this lack of targeted behavior (and failure to meet the requirements of *Calder*), the court looked for evidence of additional contacts between the defendants and the forum state and found it lacking. *Id.* Ultimately, it held that without evidence of intentional targeting, jurisdiction could not be based purely on the location of the plaintiff’s injury absent other contacts with the forum state: “Although the place that the plaintiff feels the alleged injury is plainly relevant to the inquiry, it must ultimately be

of the libel on the targeted victim, the intentional nature of the defendant's conduct, and the foreseeability of the effect of the conduct in the forum state.⁷⁴ Whatever the meaning of *Calder*, it plainly did not require jurisdiction to be based on the target audience of the libel.⁷⁵

Shifting the focus of the jurisdictional inquiry from the libel victim to the target audience is a significant move, given the fundamental nature of the harm that defamation redresses, which, while complex and difficult to define, is personal to the plaintiff and has little to do with the audience of the libel.⁷⁶ The tort of defamation is generally understood to protect a person's interest in her reputation,⁷⁷ thereby safeguarding the dignity of the individual.⁷⁸ The tort does not provide justice to the community in which the defamed person resides, except to the extent that it reinforces civility rules, restores the defamed person to rightful standing in the community,⁷⁹ and re-establishes the truth.⁸⁰ The black-letter law of defamation has no requirement of showing injury to anyone

accompanied by the defendant's own contacts with the state if jurisdiction over the defendant is to be upheld." *Id.* at 626. This holding is completely consistent with *Calder*, not a limitation on it. Other circuits have more deliberately limited *Calder*. See Spencer, *supra* note 43, at 99–103 (discussing the ways that circuit courts have limited the effects test).

⁷⁴ Liability for *Calder* and South was based on their participation in "an alleged wrongdoing intentionally directed at a California resident." *Calder v. Jones*, 465 U.S. 783, 790 (1984).

⁷⁵ The audience-targeting requirement is also at odds with the Supreme Court's statement that the "'fair warning' requirement [of the Due Process Clause] is satisfied if the defendant has 'purposefully directed' his activities at residents of the forum, and the litigation results from alleged injuries that 'arise out of or relate to' those activities." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (emphasis added) (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984)).

⁷⁶ See Spencer, *supra* note 43, at 101–03 (asserting that, by focusing on these "irrelevant others," the Fourth Circuit test simply denies jurisdiction where it would be upheld under *Calder*).

⁷⁷ See generally *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (noting that a jury can award damages for loss of reputation, shame, mortification, humiliation, loss of standing in the community, and mental anguish and suffering); RESTATEMENT (SECOND) OF TORTS ch. 24 (1977) (subtitled "invasions of interest in reputation"); Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CALIF. L. REV. 691, 693–711 (1986) (variously theorizing the reputational interest as a property, honor, or dignity interest).

⁷⁸ Lyrisa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 885 (2000).

⁷⁹ See Post, *supra* note 77, at 712–13.

⁸⁰ Cf. *Keeton*, 465 U.S. at 776 ("False statements of fact harm both the subject of the falsehood and the readers of the statement. New Hampshire may rightly employ its libel laws to discourage the deception of its citizens. There is 'no constitutional value in false statements of fact.'" (quoting *Gertz*, 418 U.S. at 340)); see also Laura A. Heymann, *The Law of Reputation and the Interest of the Audience*, 52 B.C. L. REV. 1341, 1417–22 (2011) (arguing in favor of a greater focus on the audience's interest in receiving truthful information in causes of action involving harm to reputation).

other than the plaintiff; by contrast, the plaintiff must establish that the libel is "of and concerning" the plaintiff (i.e., designates the plaintiff in such a way that people who know the plaintiff understand that she has been identified in the publication).⁸¹ Nor is it necessary to target the plaintiff's local community to prove that harm occurred in that location; rather, it is generally stated that the injury takes place wherever the offending publication is circulated, even if the plaintiff is not present in that location.⁸² Given the nature of the harm, the Fourth Circuit's almost exclusive focus on audience marks a significant shift away from the individual to the individual's community.

It is true that courts have traditionally included the circulation and intended audience of a publication as a factor when determining personal jurisdiction in libel cases. After *Calder and Keeton v. Hustler Magazine*, it is generally understood that the regular circulation within a state of a substantial number of copies of a national publication (like the *National Enquirer* or *Hustler*) will subject a media defendant to jurisdiction within the state.⁸³ When a publication does not have a national circulation, courts have taken into account other factors establishing contacts, such as the number of papers sold in the forum state and its percentage of the paper's total circulation; sales and advertising solicitations within the state and the amount of revenue they generate for the publisher; and the presence of reporters, investigators, or correspondents within the forum state.⁸⁴ A local paper with a very small circulation within the forum state may nevertheless be haled into a foreign court if it publishes an article that would be of particular interest to readers in that state.⁸⁵ Such a publication not only does particular damage to the plaintiff's reputation (for example, a defamatory publication about an elected official in that official's home state),⁸⁶ but it also injures the readers by exposing them to false statements of fact (about their elected official).⁸⁷ The Fourth Circuit's audience-targeting analysis would be

⁸¹ See, e.g., RESTATEMENT (SECOND) OF TORTS § 558; see also SACK & BARON, *supra* note 45, at 512 (noting evidence used to establish actual injury to reputation, including physical trauma, plaintiff's need for medical attention, avoidance of social contact, and change in personality or ability to concentrate); *id.* at 149–52 (describing the "of and concerning" requirement).

⁸² *Keeton*, 465 U.S. at 777 (allowing jurisdiction in forum where defamatory magazines circulated); *Telco Commc'ns v. An Apple a Day*, 977 F. Supp. 404, 408 (E.D. Va. 1997) ("[D]efamation, like libel, occurs wherever the offensive material is circulated or distributed."); RESTATEMENT (SECOND) OF TORTS § 577A cmt. A.

⁸³ *Keeton*, 465 U.S. at 770, 774 (noting that the regular circulation of 10,000 copies of *Hustler* in New Hampshire each month "cannot by any stretch of the imagination be characterized as random, isolated, or fortuitous").

⁸⁴ SACK & BARON, *supra* note 45, at 742–43.

⁸⁵ See, e.g., *Anselmi v. Denver Post, Inc.*, 552 F.2d 316, 325 (10th Cir. 1977).

⁸⁶ *Laxalt v. McClatchy*, 622 F. Supp. 737, 744 (D. Nev. 1985).

⁸⁷ Cf. *Keeton*, 465 U.S. at 776 ("False statements of fact harm both the subject of the falsehood and the readers of the statement. New Hampshire may rightly employ its libel laws to discourage the deception of its citizens. There is 'no constitutional value in false statements of fact.'" (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974))).

consistent with this prior case law if it treated the defendants' target audience as *one* factor—rather than the determinative factor—in the jurisdictional analysis.

Finally, to fully appreciate how the *Young* test varies from the analysis in *Calder*, consider how differently the two cases came out, despite remarkably similar facts. Neither *Calder* nor *South* had traveled to California in conjunction with writing the article about Shirley Jones; like the individual defendants in *Young*, they had made telephone calls to the state regarding the article but had no other contacts related to the article. In both cases, the plaintiffs were mentioned by name in the offending articles, as were the forum states and the plaintiffs' occupations, and the individual defendants clearly knew where the plaintiffs lived and worked. If the presumption of aimlessness had been applied to the *National Enquirer* (i.e., presuming that the *Enquirer* was not targeted at any particular audience in any particular state because it was directed at a national audience and accessible in all fifty states), the case against *South* and *Calder* would have been dismissed.⁸⁸

In the end, the only way to reconcile *Calder* and *Young* is to note that *Young* involved publication on the Internet. The *National Enquirer* distributed *physical* copies of its publication in California, whereas the *New Haven Advocate* and *Hartford Courant* published *electronic* versions of their newspapers in Virginia by making them accessible there on the Internet. Does the different medium of publication justify such a different test?

III. THE INTERNET BOOGEYMAN: WHY *YOUNG* RESTRICTS *CALDER*

What could have motivated the Fourth Circuit to so transparently restrict *Calder*? As previously noted, the Fourth Circuit's restrictive Internet jurisdiction cases reflect the concern that using the Internet potentially subjects a defendant to nationwide jurisdiction, thereby potentially subverting the "traditional" due process principles governing state jurisdiction over foreign

⁸⁸ See Borchers, *supra* note 10, at 483–84 (describing the inconsistencies between the holdings in *Young*, *Calder*, and *Keeton*). While there is no indication that the Fourth Circuit will extend the presumption of aimlessness to print publishers, the court's reasoning is broad enough for media defendants to argue that it should. After all, the *Enquirer* is a national publication, it publishes in all fifty states (and currently on the Internet), and therefore, under the reasoning in *Young*, cannot be said to focus on or target an audience in any particular state, even though its articles are accessible there. But see *Tamburo v. Dworkin*, 601 F.3d 693, 707 n.10 (7th Cir. 2010) (approving tentatively of the reasoning in *Young*, with the caveat that a truly nationwide paper like *USA Today* would likely be subject to jurisdiction under the *Keeton* model for libel published on its Web site). If liberally applied, the presumption of aimlessness has the potential to undo the ability of many public figures to sue for libel in their home states. See *Jackson v. Cal. Newspapers P'ship*, 406 F. Supp. 2d 893, 896, 899 (N.D. Ill. 2005) (reasoning that a plaintiff with a reputation that is "truly national" in scope is less likely to feel the brunt of the harm in his place of residence and that the state of Illinois has a diminished interest in protecting the reputations of its residents with national reputations).

defendants.⁸⁹ This concern can also be seen in cases applying *Young* or similar analyses.⁹⁰ The concerns are partly bound up with traditional notions of state sovereignty and the territorial basis of jurisdiction, but also betray a fear that it would be unfair to subject a defendant to national jurisdictional exposure simply because the Internet is such a powerful medium;⁹¹ the instinct, it seems, is to preserve traditional notions of jurisdiction by protecting the defendant from perceived overreaching by state courts based on the defendant's use of the Internet.

The Fourth Circuit is not alone in its concerns about jurisdiction in cases involving the Internet. It is a problem that has vexed the nation's courts for the better part of two decades and a satisfactory rule has yet to emerge. The Internet has spawned a series of jurisdictional innovations that are predicated on misunderstandings and fear of the medium; *ALS Scan* and *Young* represent stages in the evolution of a best practice that has included the "*Zippo* test" and other variations on *Calder*.⁹² And to be fair, the technological revolution of the Internet has put even greater pressure on geographically-bounded notions of state sovereignty than did the inventions of the automobile and plane travel or the globalization of commerce.⁹³

In recent years, however, commentators and courts have begun to coalesce around the idea that the well-established tools of modern personal jurisdiction analysis—long-arm statutes, minimum contacts analysis, and the indicators of constitutional reasonableness—are adequate to the task of keeping Internet jurisdiction within the bounds of the Due Process Clause.⁹⁴ This section argues

⁸⁹ *Young v. New Haven Advocate*, 315 F.3d 256, 263 (4th Cir. 2002); *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 712 (4th Cir. 2002).

⁹⁰ See, e.g., *Dailey v. Popma*, 662 S.E.2d 12, 14 (N.C. Ct. App. 2008) (noting that the Internet presents "unique considerations" for determining personal jurisdiction, requiring it to adopt tests specifically designed for the Internet).

⁹¹ Cf. MIKE GODWIN, *CYBER RIGHTS: DEFENDING FREE SPEECH IN THE DIGITAL AGE* 63–77 (2d ed. 2003) (opining on the judicial and congressional backlash against the freedom of the Internet).

⁹² See Spencer, *supra* note 43, at 76–86 (summarizing the evolution of the various approaches used in the federal courts and criticizing the various tests).

⁹³ Cf. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 308–09 (1980) (Brennan, J., dissenting) (suggesting that the jurisdictional principles of *International Shoe* may have become outdated due to rapid changes in commerce and transportation).

⁹⁴ See, e.g., *Tamburo v. Dworkin*, 601 F.3d 693, 703 n.7 (7th Cir. 2010) (declining to adopt a special test for Internet-based libel and relying on *Calder* instead); *Fraser v. Smith*, 594 F.3d 842, 847 (11th Cir. 2010) (declining to adopt an Internet-specific jurisdictional test); *Caiazzo v. Am. Royal Arts Corp.*, 73 So. 3d 245, 255 (Fla. Dist. Ct. App. 2011) (per curiam) (explicitly refusing to adopt the *Zippo* test in an Internet-based libel case); Catherine Ross Dunham, *Zippo-ing the Wrong Way: How the Internet Has Misdirected the Federal Courts in Their Personal Jurisdiction Analysis*, 43 U.S.F. L. REV. 559, 584 (2009) (concluding that "[a]ll things new do not require new things"); Allyson W. Haynes, *The Short Arm of the Law: Simplifying Personal Jurisdiction over Virtually Present Defendants*, 64 U. MIAMI L. REV. 133, 163–64 (2009) (arguing that states should use long-arm statutes to limit personal jurisdiction based on Internet contacts); Spencer, *supra* note 43, at 104–16

that these analytical tools are also adequate in the context of Internet libel, with a few adjustments to take account of the difference between libel published on paper and libel published on the Internet. It also explores whether a highly restrictive test like the one in *Young* is desirable to avoid chilling speech on the Internet—either of media or individual defendants.

A. *The Young Test Overlooks the Reach and Impact of Internet Publications*

The *Young* test relies on the presumption that Internet publications are—by virtue of their ubiquitous scope—targeted nowhere. It thus treats local and regional print newspapers *as if* they were available only to their local and regional audiences, even when they have a geographically unrestricted Web presence. But this is nothing more than an attempt to superimpose geographical boundaries on a medium whose essence transcends such boundaries; by publishing on the Internet, the paper has deliberately made itself accessible to the nation, even if it does not aspire to a national audience.

Publishers that use the Internet are not blind to its reach (it is called the World Wide Web, after all). On the contrary, Internet publishers use the medium precisely because of its scope and because this is how readers now expect and demand to get their information.⁹⁵ The *New Haven Advocate* could limit itself to print publications, but it likely maintains a Web site because the site enhances the paper's reach and readership for a fraction of the cost of producing and distributing paper copies.⁹⁶ The *Advocate* may not be *targeting* a Virginia audience, but the Internet allows it to *reach* a Virginia audience.⁹⁷ Thus, while an Internet publisher might not intend to serve a national market, by using the Internet, the publisher is knowingly making its writing accessible to the national market.

But is this choice to use the Internet enough to show that the publisher has “purposefully directed” its publication at an audience in the forum state?⁹⁸ After

(arguing that courts should apply traditional principles to cases involving Internet contacts until the Supreme Court indicates otherwise); Allan R. Stein, *The Unexceptional Problem of Jurisdiction in Cyberspace*, 32 INT'L LAW. 1167, 1173 (1998) (arguing that “in spite of all its space-defying qualities, claims arising on the Internet are susceptible to a fairly coherent resolution under existing jurisdictional doctrine”).

⁹⁵ Spencer, *supra* note 43, at 87 (criticizing the presumption of aimlessness).

⁹⁶ See *supra* note 53.

⁹⁷ Further, while it is generally true that Internet publication automatically produces world-wide access, sophisticated media defendants are capable of employing geographic limitation devices that limit access of their media to particular jurisdictions. Spencer, *supra* note 43, at 87 (noting that use of such devices could indicate a desire to reach less than a nationwide audience).

⁹⁸ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985) (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774–75 (1984)).

all, the “foreseeable unilateral”⁹⁹—activity of a third party—a Virginia resident who searches for news about Wallens Ridge on the Internet, or a news aggregator that pulls the article to the Web browsers of Virginians—must intervene before the article “reaches” Virginia. I believe that it is, because the publisher at the outset controls the distribution of its publication by choosing to place it on the Web. To use an analogy to the “stream of commerce” cases, the publisher that uses the Internet has decided to market its product through a national distributor to a national audience.¹⁰⁰ It can keep itself truly local by restricting itself to print, or by using geographic limiters to control access to its Web site or to certain content and features on its Web site. It can also choose which articles to publish in which medium—print or electronic. In short, the publisher purposefully avails itself of the Internet as a national medium, and should not be allowed to claim—or be imputed with—innocence of its potential audience.

The Internet also creates new and powerful ways to target a libel victim without circulating papers in his home state or even designing one’s Web site for readers in that forum.¹⁰¹ In *Young*, for example, it is likely that the articles published in the *Hartford Courant* and the *New Haven Advocate* were of great interest to a Virginia audience because they decried harsh conditions in a Virginia prison. In addition to encouraging public debate in Connecticut, the articles might have had the effect of encouraging the Virginia taxpayers who read the articles to debate whether they supported such harsh prison conditions and the (allegedly racist) public official who implemented them. And even though physical copies of the papers were not circulated to a Virginia audience, and the defendants’ Web sites were not designed to appeal to Virginia readers, the media defendants could reasonably have anticipated (or even hoped) that the subject matter of the articles would be of interest to this audience in addition to its Connecticut readership. By posting the articles on the Internet—and thus making them readily accessible to anyone in Virginia with a Web browser and Google¹⁰²—mentioning a Virginia resident by name, and making harshly

⁹⁹ *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 110 (1987) (plurality opinion).

¹⁰⁰ *See id.* at 112 (noting that additional conduct of the defendant that “may indicate an intent or purpose to serve the market in the forum State” includes “marketing the product through a distributor who has agreed to serve as the sales agent in the forum State”); *see also* *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780, 2801 (2011) (Ginsburg, J., dissenting) (arguing that an international manufacturer purposefully avails itself of the market in all the states served by its national distributor). *But see id.* at 2790 (plurality opinion) (finding that the intent to serve a national market does not translate into an intent to serve the market of a particular state).

¹⁰¹ Lidsky, *supra* note 78, at 863–64.

¹⁰² Residents of Virginia who use news aggregator Web sites may have had the article “pulled” to them automatically, eliminating the need for individualized searches. *See generally* Emma Heald, *Google News and Newspaper Publishers: Allies or Enemies?*, EDITORS WEBLOG (Mar. 11, 2009, 3:39 PM), http://www.editorsweblog.org/analysis/2009/03/google_news_and_newspaper_publishers_all.php (explaining the basic mechanism of

critical comments about the state prison run by that resident, the defendants (especially if they have any experience vetting articles for newspapers) could reasonably anticipate being haled into court for libel in Virginia.

A Web publisher's deliberate choice to access a national audience casts doubt on the claim that it is unfair to subject her to jurisdiction in remote states where the writing is accessible. Instead of presuming that the publisher is aimless or unintentional in taking advantage of a cheap and effective nationwide medium, it is more accurate to presume that the publisher is purposefully making the writing accessible to the entire nation.¹⁰³ Using the minimum contacts analysis, publication by Internet (purposefully availing oneself of the privilege of making one's writings available within a state) would be *one* of the many factors—including the target audience of the publication—that determines whether the defendant had sufficient contacts with the forum state. But there seems little reason to avoid or ignore the fact that the Internet, by making the libel readily accessible there, facilitated the plaintiff's injury in the forum state.

Further, it seems wrong to assume that the differences between print and Internet publications require courts to employ different tests for jurisdiction over libel defendants. Internet publication mimics—albeit in a more powerful way—the mechanism of print publication. The similarities between the media are obvious. Both forms of publication permit language (including libel) to be carried to forums distant from the source of the language (the author or publisher). Both forms of publication facilitate the long-term storage of information and are susceptible to “viral” republication—they can be passed from person to person, copied, excerpted, read aloud, transmitted or carried into different jurisdictions. The chief difference is similarly obvious: the Internet accomplishes its job with a speed and scope not possible using print; it allows every individual with an Internet connection to become, in effect, a broadcaster. In addition, the potential for viral republication and the long-term caching of a libel is much greater on the Internet.

Without question, society must make adjustments to its jurisdictional rules when a new technology dramatically enhances the power of an old technology. The advent of modern printing technology forced a change in the longstanding defamation rule that a publisher was liable for each separate publication of libel; the current law holds that the statute of limitations is tolled by one publication, thus protecting publishers from the devastating liability of the older rule, in which each republication provided a separate cause of action.¹⁰⁴ Similarly, when cars made interstate travel—and accidents with drivers from foreign states—more prevalent, courts had to adjust and update their jurisdictional rules. But the rules were not updated to protect only the out-of-state motorists.

news aggregators such as Google News, which pull stories from multiple news sources and can be personalized to reflect the reader's particular interests).

¹⁰³ Spencer, *supra* note 43, at 88 (arguing that use of the Internet should create a rebuttable presumption of contact with the forum state).

¹⁰⁴ SACK & BARON, *supra* note 45, at 363–65.

The courts considering non-resident motorist statutes weighed the plaintiff's interest in having a "convenient" mechanism for obtaining relief against the defendant's interest in not being sued in a foreign jurisdiction and factored in the interests of other stakeholders in the interstate judicial system.¹⁰⁵ Thus far, the Fourth Circuit has adjusted its personal jurisdiction analysis in only one direction—to protect Internet publishers from nationwide jurisdiction. Given that the Internet dramatically enhances the potential for harm to reputation, the court's analysis should also ask whether the victims of libel have a convenient and effective forum for relief.¹⁰⁶

B. A Thought Experiment to Show How Traditional Jurisdictional Principles Provide Adequate Safeguards to Protect the Due Process Rights of Defendants Who Publish on the Internet

To illustrate the ways that traditional personal jurisdiction analysis has built-in safeguards for Internet publishers, this section first describes the case of *Dailey v. Popma*, a North Carolina Court of Appeals opinion in which the court adopted the *Young* test and applied it to a libel case involving an individual (not media) defendant. It then reconsiders *Dailey* using a more typical jurisdictional analysis—minimum contacts and constitutional reasonableness—to explore what that analysis might have looked like and what it might have revealed.

The discussion follows the framework of personal jurisdiction analysis established in *World-Wide Volkswagen* and later cases: it first considers whether the defendant's purposeful contacts with the forum state gave rise to the lawsuit and are substantial enough for the defendant to have anticipated a lawsuit in the forum.¹⁰⁷ Second, it examines whether it is constitutionally reasonable for the State to exercise jurisdiction over the defendant. This latter analysis requires balancing "the burden on the defendant, . . . the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, . . . the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies."¹⁰⁸

¹⁰⁵ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980); *Hess v. Pawloski*, 274 U.S. 352, 356 (1927).

¹⁰⁶ *Cf. World-Wide Volkswagen*, 444 U.S. at 309–12 (Brennan, J., dissenting) (arguing that the constitutional concept of fairness does not require giving the defendant an "unjustified veto" over otherwise appropriate fora). *Contra* Robertson, *supra* note 46, at 5 (arguing that the plaintiff should be forced to travel to the defendant's jurisdiction to sue in all but the exceptional case where a plaintiff can prove the defendant's wrongdoing at the outset of the lawsuit).

¹⁰⁷ *World-Wide Volkswagen*, 444 U.S. at 294.

¹⁰⁸ *Id.* at 292 (citing *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957); *Kulko v. Cal. Superior Court*, 436 U.S. 84, 92–93, 98 (1978)).

As will be shown, all of these factors can be used to mitigate the jurisdictional exposure of an Internet publisher.¹⁰⁹

1. *The North Carolina Court of Appeals Adopts the Young Test in Dailey v. Popma*

In *Dailey v. Popma*, the North Carolina Court of Appeals applied the test in *Young* to deny jurisdiction over a foreign defendant in a libel case involving two individuals.¹¹⁰ The plaintiff, Dailey, was a North Carolina resident who operated “shooting ‘camps’” in North Carolina and Alabama, among other states.¹¹¹ The defendant, Popma, was a Georgia resident who posted the allegedly defamatory comments about Dailey and his camps on an Internet “bulletin board.”¹¹² Popma had owned a residence in North Carolina until shortly before Dailey sued him.¹¹³

Had the court applied the simplified, three-step *Calder* effects test to the case, it likely would have found the minimum contacts requirement satisfied. Reading the complaint favorably to the plaintiff, the postings mentioned Dailey and his shooting camps by name, Popma knew that the plaintiff lived and operated camps in North Carolina, and at least one other participant in the Internet discussion board was a North Carolina resident.¹¹⁴ These facts are likely sufficient to satisfy the effects test, as they establish that Popma could have foreseen that he might be subject to jurisdiction in North Carolina for publishing to at least one North Carolina resident allegedly injurious falsehoods about another North Carolina resident who operates a business in that state.¹¹⁵

¹⁰⁹ Spencer, *supra* note 43, at 105–07. States can further limit jurisdiction over foreign publishers using their long-arm statutes. Haynes, *supra* note 94, at 162–64.

¹¹⁰ *Dailey v. Popma*, 662 S.E.2d 12, 18 (N.C. Ct. App. 2008). The North Carolina courts had previously adopted the Fourth Circuit’s test from *ALS Scan* for jurisdiction in cases with electronically mediated contacts. *Havey v. Valentine*, 616 S.E.2d 642, 647–48 (N.C. Ct. App. 2005).

¹¹¹ *Dailey*, 662 S.E.2d at 15. Dailey’s shooting camps teach riflery and marksmanship skills. See generally Mattathias Schwartz, *Firing Line*, N.Y. TIMES, Aug. 1, 2010, § 6 (Magazine), at 38 (describing one of Dailey’s camps); PROJECT APPLESEED HOME, <http://appleseedinfo.org/> (last visited Jan. 22, 2012) (describing the organization as “dedicated to teaching every American our shared heritage and history as well as traditional rifle marksmanship skills”).

¹¹² Affidavit of Donald Popma ¶ 5, *Dailey*, 662 S.E.2d 12 (No. 06 CVS 9903).

¹¹³ *Dailey*, 662 S.E.2d at 14–15; Affidavit of Donald Popma, *supra* note 112, ¶ 3.

¹¹⁴ *Dailey*, 662 S.E.2d at 15; Complaint ¶¶ 1–9, *Dailey*, 662 S.E.2d 12 (No. 06 CVS 9903); Affidavit of Donald Popma, *supra* note 112, ¶ 5. Because Dailey failed to submit an affidavit in support of jurisdiction, or any of the offensive postings in question, the court credited the defendant’s version of the facts. *Dailey*, 662 S.E.2d at 16. North Carolina does not follow federal pleading rules. *Holleman v. Aiken*, 668 S.E.2d 579, 584 (N.C. Ct. App. 2008).

¹¹⁵ *Dailey*, 662 S.E.2d at 18.

Instead of applying *Calder* and analyzing whether it would be reasonable to assert jurisdiction over Popma, the court of appeals adopted *Young* and analyzed whether Popma, through his Internet postings, had the "intent to target and focus on North Carolina readers."¹¹⁶ Despite Popma's implicit admission that some of the discussants on the bulletin board were from North Carolina,¹¹⁷ the court found insufficient evidence that he intended "to direct his content to a North Carolina audience."¹¹⁸ Because the court found that minimum contacts in the form of audience targeting were lacking, it did not conduct a constitutional reasonableness analysis, which would have considered factors such as the burden on Popma of defending in a foreign state, or whether Dailey would have an effective and convenient remedy for his injury if he was denied a forum in North Carolina.¹¹⁹

The opinion in *Dailey*, like that in *Young*, manifests a deep unease with basing personal jurisdiction on Internet-mediated contacts. For example, the court worried that "[t]he defense of lack of personal jurisdiction would, in effect, be eliminated from all cases involving defamation on the internet because: '[T]he Internet is omnipresent—when a person places information on the Internet, he can communicate with persons in virtually every jurisdiction.'"¹²⁰

The opinion in *Dailey* also drew a sharp distinction between Internet and print publications, especially in light of cases involving print libel in which North Carolina has aggressively asserted its long-arm jurisdiction. In *Saxon v. Smith*, for example, the defendant, Smith, mailed 100 defamatory newsletters to North Carolina residents from Virginia.¹²¹ Given that the injury in defamation occurs "wherever the offending material is circulated," the court in *Saxon* concluded that the plaintiff's injury took place in North Carolina.¹²² Following

¹¹⁶ *Id.* (emphasis added).

¹¹⁷ Popma's jurisdictional affidavit averred that he and "some of the participants in the bulletin board discussion were not located in North Carolina," implicitly admitting that some of the discussants were from North Carolina. *Id.*

¹¹⁸ *Id.* at 19 (emphasis added).

¹¹⁹ The court need not weigh the reasonableness factors if it finds insufficient contacts between the defendant and the forum state. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980). However, the fairness factors are an already-established limit on the defendant's exposure to nationwide jurisdiction and might mitigate the defendant's jurisdictional exposure.

¹²⁰ *Dailey*, 662 S.E.2d at 18 (alteration in original) (quoting *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 712 (4th Cir. 2002)).

¹²¹ *Saxon v. Smith*, 479 S.E.2d 788, 790 (N.C. Ct. App. 1997).

¹²² *Id.* at 792–93. The court in *Saxon* also relied on *Calder* to find jurisdiction over Saxon's other intentional tort claims (intentional infliction of emotional distress and malicious prosecution):

North Carolina was the situs of the tortious injury alleged in each. Defendants' distribution of the newsletter in North Carolina and registering of a complaint with law enforcement authorities [in Virginia] were actions directed at plaintiff within this state.

Saxon, the court in *Popma* could have concluded that Dailey was injured in North Carolina by Popma's choice to post on the Internet, which "circulated" the material in North Carolina by making the material accessible there. Mimicking the Fourth Circuit, however, the court of appeals found that "[a]n [I]nternet posting, such as the ones in this case—which is not 'sent' anywhere in particular, but rather can be accessed from anywhere in the world—is a contact of a qualitatively different 'nature' than a physical mailing."¹²³ Thus, "the fact that some unspecified number of participants in the discussion groups might be North Carolinians" did not establish targeting or focus on a North Carolina audience.¹²⁴ The presumption of aimlessness worked in favor of Popma.

2. What Might a More Traditional Jurisdictional Analysis Have Revealed?

As previously demonstrated, even a simplistic consideration of the factors relevant in *Calder* would likely have resulted in a finding of minimum contacts in *Dailey v. Popma*: the defendant made allegedly defamatory statements about a North Carolina resident, whom he knew to run a North Carolina business, and the defendant was aware that at least one of the other participants in the bulletin board was a North Carolina resident.

This conclusion in favor of jurisdiction is also supported by a more careful consideration of other relevant contacts, including the type of Internet forum where Popma posted his commentary. Bulletin boards (also called Internet forums) are sometimes focused on geographical topics; had Popma posted his comments on, for example, the North Carolina Gun Owners forum,¹²⁵ he clearly would have targeted a North Carolina audience. More often, however, a bulletin board is designed to appeal to people with similar interests or hobbies, regardless of their location.¹²⁶ Thus, for example, gun enthusiasts might participate in a forum generally dedicated to people with such interests,¹²⁷ or in a more specialized forum for people interested in a particular type of gun.¹²⁸ By posting to this kind of generalized bulletin board, Popma was not targeting a North Carolina audience, but he was clearly targeting an audience of people to whom Dailey's reputation mattered. Further, if the Internet indeed generated

The alleged resultant harm occurred in North Carolina, the residence of plaintiff, not Virginia, the location of defendants.

Id. at 793–94.

¹²³ *Dailey*, 662 S.E.2d at 19.

¹²⁴ *Id.* at 18.

¹²⁵ See, e.g., N.C. GUN OWNERS, <http://www.ncgunowners.com/> (last visited Apr. 14, 2012).

¹²⁶ Lidsky, *supra* note 78, at 897.

¹²⁷ See, e.g., HIGH ROAD, <http://www.thehighroad.org/> (last visited Apr. 14, 2012).

¹²⁸ See, e.g., 1911 FORUM, <http://1911forum.com/> (last visited Apr. 14, 2012); GLOCK TALK, <http://www.glocktalk.com/> (last visited Apr. 14, 2012).

significant business opportunities for Dailey, Popma's choice of forum would have caused the brunt of any reputational injury to be felt in North Carolina, where Dailey lives. Without the *Young* presumption of aimlessness in place, Popma's admitted knowledge of the location of Dailey's home and business made it foreseeable that his comment would injure Dailey in North Carolina. By deliberately posting these comments on an Internet bulletin board, Popma must have known that his comments would be available to other gun enthusiasts in North Carolina or to other people who might potentially do business with Dailey in North Carolina. Thus, he could have foreseen that he might be haled into court in North Carolina, even if he was not deliberately seeking a North Carolina audience for his comments. But this is merely the first step in the minimum contacts analysis.

The next step is to determine whether the cause of action is "related" to the forum state, as required for a finding of specific jurisdiction,¹²⁹ which will almost certainly be the basis of jurisdiction in the case of an individual non-resident libel defendant. A close nexus between the contact, the cause of action, and the forum state bolsters the foreseeability of the defendant's conduct resulting in a lawsuit in the forum state. In *Dailey v. Popma*, relatedness would have been established by the specific mention of Dailey and his shooting camps, as well as their location in the forum state. It is not clear from the facts of the case, however, that the content of the libel specifically mentioned North Carolina. If there was no mention of North Carolina, or there was no evidence that Popma knew where Dailey lived and worked, or perhaps if Popma had only made disparaging comments about Dailey's *Alabama* shooting camps, then Popma would be able to argue that he could not have foreseen being haled into court in North Carolina and that the libel was not targeted at the plaintiff in his home state.

An additional consideration in the minimum contacts analysis is to determine whether the defendant's own purposeful behavior brought him into contact with the forum state, or whether the contact was created through the unilateral or fortuitous behavior of third parties.¹³⁰ In most libel cases, that requirement is satisfied by the intentional (not accidental) nature of actions underlying the tort of defamation.¹³¹ There is nothing accidental about publishing comments on an Internet bulletin board or utilizing a medium that the publisher knows will be accessible in the plaintiff's home state. The volitional behavior of the defendant is thus the basis of the alleged harm and of personal jurisdiction. But if, for example, Popma had written the comment in an e-mail to a third party not located in North Carolina, and the third party had then forwarded the e-mail or quoted its contents on a bulletin board, Popma

¹²⁹ See *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957) (noting that the contacts related to the cause of action must create a "substantial connection" with the forum state).

¹³⁰ *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

¹³¹ *Murphy v. Erwin-Wasey, Inc.*, 460 F.2d 661, 664 (1st Cir. 1972) (noting that intentional torts like libel and fraud generally satisfy the constitutional requirement of "purposeful[] avail[ment]").

would have a good argument that he had not purposefully used the Internet to make the comments accessible in North Carolina.

Although the factual record in *Dailey v. Popma* was not well developed, it seems likely that adequate facts existed to support a finding of contacts under the expanded *Calder* approach. That conclusion does not end the analysis. Even assuming that Popma met the minimum contacts threshold, a court would still have to determine whether the assertion of jurisdiction is constitutionally reasonable. Two aspects of the reasonableness analysis are particularly relevant to concerns that the Internet exposes a libel defendant to nationwide personal jurisdiction: the plaintiff's interest in convenient and effective relief, and the forum state's interest in adjudicating the suit. A plaintiff who sues in his home state can make a strong argument that he has chosen a convenient forum. Further, the home state has a strong interest in vindicating the interests of its citizens. Because Dailey sued Popma in North Carolina, Dailey could make a strong argument that jurisdiction in North Carolina, Dailey's home state, was reasonable: it is convenient to Dailey, and North Carolina has a strong interest in protecting the reputations of its citizens. Nevertheless, Popma would still be able to argue that travelling to North Carolina from Georgia to defend the suit would be unduly burdensome.

But what if Dailey had sued Popma in Alabama, where he also ran shooting camps? Jurisdiction in Alabama might have been foreseeable to Popma (if he knew that Dailey ran shooting camps there), but Dailey would be harder pressed to argue that it was a convenient forum for him (unless, perhaps, he spent a significant amount of time in the state), and Alabama has less of an interest in protecting the reputational interests of non-citizens. Finally, if Dailey had sued Popma in Alaska (where the article was also accessible), he would struggle to make a bona fide argument that the forum was convenient for him or that Alaska had a strong interest in protecting the reputational rights of someone with no contact with the state (not to mention that the injury was not related to the forum state or foreseeable based on the content of the libel).

The Supreme Court has held, however, that a libel plaintiff can assert injury even in states where she has a small reputation or is anonymous, and that states may construct their legal regimes to take an interest in protecting the reputations of non-residents.¹³² The breadth of this ruling, which seemingly threatens Internet publishers with nationwide jurisdiction, is mitigated by the limited circumstances that give rise to unbounded libel tourism. In particular, there must be evidence that the forum state has taken a particular interest in protecting their populace from false statements of fact made about non-residents. In *Keeton*, for example, New Hampshire had drafted its criminal

¹³² *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776–77 (1984) (noting that New Hampshire may “extend its concern to the injury that in-state libel causes within New Hampshire to a nonresident,” and that a plaintiff “may suffer harm even in a state in which he has hitherto been anonymous”); see N.H. REV. STAT. ANN. § 644:11 (2007) (misdemeanor to make defamatory statements about “any other living person”); *id.* § 300:14 (1977) (noting deletion of residency requirement).

defamation statute without a requirement that the victim be a resident and deleted from its long-arm statute the requirement that the plaintiff be a New Hampshire resident.¹³³ Not every state has exhibited such a desire to vigorously protect its populace from injurious falsehoods or to safeguard the reputations of non-residents.¹³⁴ States concerned that their courts might overreach in cases of Internet libel can amend the relevant legislation to clarify exactly whom they want to hale into court on charges of libel.

But what about states that might want to become havens for libel tourism (say, for example, New Hampshire, with its long statute of limitations for libel and its expansive long-arm statute)? Even in these extreme circumstances, there are additional constitutional fairness considerations that libel defendants can argue to avoid jurisdiction¹³⁵: the need for the interstate judicial system to resolve disputes efficiently and the “shared interest of the several States in furthering fundamental substantive social policies.”¹³⁶ It will be difficult for the plaintiff to argue that a state with which neither she nor the defendant has any connection is an efficient forum for the case; the travel expenses for parties and witnesses counsel strongly against it. Finally, the defendant can argue that it contradicts public policy for any one state to aggressively police Internet libel that does not injure its residents because it undermines state sovereignty and the limits on personal jurisdiction inherent in the Due Process Clause.¹³⁷

This seems like a logical place to find the limits of personal jurisdiction in cases of Internet libel—by pressing on the bona fides of the plaintiff’s choice of forum, on the burden to the defendant of having to defend in a remote forum, on the efficiency of the chosen forum, and the substantive concerns associated with permitting such jurisdiction. True, it is a messy and unpredictable approach, but a messy test is preferable to one that relies on fictional presumptions about the Internet. Courts can limit personal jurisdiction by being skeptical of a plaintiff’s choice to travel far from home to file her lawsuit. But, before denying jurisdiction over a foreign defendant, courts should also consider carefully

¹³³ *Keeton*, 465 U.S. at 777.

¹³⁴ Currently, only thirteen states have criminal libel statutes: Colorado, COLO. REV. STAT. § 18-13-105 (2011); Florida, FLA. STAT. §§ 836.01–.11 (2011); Idaho, IDAHO CODE ANN. §§ 18-4801 to -4809 (2004); Louisiana, LA. REV. STAT. ANN. § 14:47 (2007); Michigan, MICH. COMP. LAWS ANN. § 750.370 (West 2004); Minnesota, MINN. STAT. § 609.765 (2010); New Hampshire, N.H. REV. STAT. ANN. § 644:11 (2007); New Mexico, N.M. STAT. ANN. § 30-11-1 (2004); North Carolina, N.C. GEN. STAT. § 14-47 (2011); North Dakota, N.D. CENT. CODE § 12.1-15-01 (1997); Oklahoma, OKLA. STAT. ANN. tit. 21, §§ 771–781 (West 2002); Virginia, VA. CODE ANN. § 18.2-417 (2009); and Wisconsin, WIS. STAT. § 942.01 (Supp. 2011).

¹³⁵ And if all jurisdictional arguments fail, the defendant can also move for a transfer based on convenience or dismissal for forum non conveniens.

¹³⁶ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

¹³⁷ The majority opinion in *Keeton* did not address the defendant’s state sovereignty and federalism arguments. See Brief for Respondents at 29–36, *Keeton*, 465 U.S. 770 (No. 82-485). Justice Brennan briefly dismissed these concerns in his concurring opinion. *Keeton*, 465 U.S. at 782 (Brennan, J., concurring).

whether the lawsuit will be pursued at all if the plaintiff is denied a forum in her home state.

C. First Amendment Concerns

Given that libel actions are bound up with First Amendment concerns, it is important to examine whether free speech values are threatened by a more robust rule of personal jurisdiction in libel cases. Personal jurisdiction and constitutional libel doctrines serve fundamentally different goals. The goals of personal jurisdiction are to honor state sovereignty and, as a matter of fairness, avoid subjecting defendants to jurisdiction in remote and unforeseeable forums. Jurisdictional doctrine is also concerned with helping potential defendants rationally manage the risk of litigation associated with their “primary conduct.”¹³⁸ In contrast, the substantive limitations on libel imposed by *New York Times Co. v. Sullivan* prevent libel suits from inhibiting speech on public matters; the libel limitations ensure that dialogue on such matters can be “uninhibited, robust, and wide-open,” even if it becomes “vehement, caustic, and sometimes unpleasantly sharp,” or occasionally includes erroneous information.¹³⁹ First Amendment doctrine also protects against the “chill” of self-censorship associated with vague or overbroad speech regulations, such as overzealously enforced libel laws.

But the Supreme Court has consistently rejected the suggestion that libel plaintiffs should have to leap extra *jurisdictional* hurdles to avoid chilling speech. In *Calder*, the Supreme Court unequivocally stated that any potential chill on free speech stemming from uncertainty about jurisdiction—including exposure to nationwide jurisdiction—is adequately addressed by the “constitutional limitations on the substantive law governing [libel].”¹⁴⁰ Furthermore, “[t]o reintroduce those concerns at the jurisdictional stage would be a form of double counting,” and “needlessly complicate an already imprecise inquiry.”¹⁴¹

Yet free speech advocates (like myself) cannot easily dismiss lingering concerns for the speech rights of Internet publishers. The notorious imprecision of the personal jurisdiction inquiry introduces significant uncertainty into the publisher’s risk calculus. Under the minimum contacts analysis outlined in the previous section, a publisher’s knowing use of the Web potentially means minimum contacts with fifty states, and the limits inherent in the jurisdictional fairness inquiry may not seem like adequate protection from such exposure.¹⁴²

¹³⁸ *World-Wide Volkswagen*, 444 U.S. at 297.

¹³⁹ 376 U.S. 254, 270 (1964).

¹⁴⁰ *Calder v. Jones*, 465 U.S. 783, 790 (1984); see also Lidsky, *supra* note 78, at 872–75 (noting the many obstacles for libel plaintiffs posed by the substantive demands of tort law, First Amendment doctrine, and other constitutional privileges).

¹⁴¹ *Calder*, 465 U.S. at 790; *Keeton*, 465 U.S. at 780 n.12.

¹⁴² Spencer, *supra* note 43, at 113–14.

Such uncertainty might chill the otherwise robust culture of expression on the Internet.¹⁴³

National media outlets have, of course, been coping with this jurisdictional regime for thirty years. But smaller news outlets may hesitate before publishing on the Web, or may be more inclined to use geographic limiters on their content, thereby “balkanizing” the Web.¹⁴⁴ Finally, the risk will be greatest for individual publishers on the Internet, such as bloggers or participants in bulletin boards and chat rooms. If such individuals publish a libel concerning private figures on matters of private concern, these individuals may be subject to jurisdiction in states with widely varying standards for libel, including, perhaps, a strict liability standard.¹⁴⁵ Furthermore, individual defendants typically are not well insured against the cost of defending a libel lawsuit—not to mention one filed in a remote forum—and thus the threat of a libel action may “overdeter” Internet speech from individuals.¹⁴⁶ This section briefly addresses these issues in turn: first, the concerns of smaller media outlets, and second, the concerns of individual publishers.

1. *Better Vetting*

The cost imposed on local or regional media outlets by increased jurisdictional exposure likely can be addressed through pre-publication review processes—vetting—before articles are published to the Web. The process of vetting involves identifying potentially libelous statements in an article and assessing the risk of a lawsuit.¹⁴⁷ Assuming that all responsible media sources vet their articles, vetting for fifty-state liability is not significantly more costly than vetting only for local liability. Once a newspaper identifies potentially libelous comments in the article, it can rationally anticipate litigation exposure in the home jurisdiction of the person named in the article, especially if the

¹⁴³ But see Lidsky, *supra* note 78, at 885–87 (arguing that defamation law could have the beneficial effect of making Internet discourse more civil, rational, and coherent).

¹⁴⁴ Spencer, *supra* note 43, at 115.

¹⁴⁵ See *Dun & Bradstreet, Inc., v. Greenmoss Builders, Inc.*, 472 U.S. 749, 763 (1985) (holding that “recovery of presumed and punitive damages in defamation cases absent a showing of ‘actual malice’ does not violate the First Amendment when the defamatory statements do not involve matters of public concern”); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974) (holding that “so long as [states] do not impose liability without fault,” they “may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual”); SACK & BARON, *supra* note 45, at 352–55; Lidsky, *supra* note 78, at 913.

¹⁴⁶ See Lidsky, *supra* note 78, at 888–91 (discussing the chilling effect of defamation lawsuits on individual defendants).

¹⁴⁷ See generally THE ASSOCIATED PRESS STYLEBOOK AND BRIEFING ON MEDIA LAW 367–68 (Norm Goldstein ed., 42d ed. 2007) [hereinafter ASSOCIATED PRESS STYLEBOOK] (providing a checklist for editors to review, including buzzwords and red flags).

jurisdiction is named in the article.¹⁴⁸ In the case of the *New Haven Advocate*, for example, the offending article clearly identified Virginia and the name and occupation of the plaintiff, Young. The publisher would then need to factor in the potential cost of defending a lawsuit in a remote location. Geography becomes one additional risk factor in the vetting process, not a matter of requiring additional personnel to engage in the risk assessment or engaging in complex additional vetting processes.¹⁴⁹

Such vetting does not invariably result in censoring the risky statement; often it merely forces the reporter to check the facts more carefully (truth being a defense to libel).¹⁵⁰ The media outlet would also have the option of publishing that article only in its print version or using a geographical restrictor if it publishes the article on its Web site. Such limits on publication would be factors showing an intent *not* to direct the libel at the plaintiff in her home state and would work in the defendant's favor if the plaintiff were to sue in that forum.¹⁵¹

Finally, media outlets typically publish articles on matters of public concern. In this regard, they have the advantage that the applicable substantive libel laws are essentially the same in all fifty states, regardless of the potential plaintiff's location, because of First Amendment limits on libel actions brought against media defendants on matters of public concern.

2. Reform of Substantive Law

Frankly, there is little to say to reassure the individual Internet publisher about potentially expanding his jurisdictional exposure. A restrictive jurisdictional test, like the one in *Young*, better protects that publisher against jurisdictional exposure than a messy balancing test that relies on multiple amorphous factors (and an advocate with the skill and savvy to argue them well). Nevertheless, courts should not construct fictions about the Internet out of fear of the medium or even an understandable (if misguided) desire to protect the speech of the individual publisher. As the Supreme Court has made clear,

¹⁴⁸ As a practical matter, most libel cases involve individual plaintiffs, who are likely present in only a few jurisdictions, not in *every* state where the Internet can be accessed. Thus, a defendant who publishes a libel—even one who publishes in fifty states—is realistically at risk of being haled into court for defamation in *one or two* jurisdictions, not all fifty, and the substance of the libel will most likely reveal the jurisdictions of highest risk. The example of libel tourism approved in *Keeton* is the exception, not the rule. *Tamburo v. Dworkin*, 601 F.3d 693, 707 n.10 (7th Cir. 2010).

¹⁴⁹ The *Associated Press Stylebook* does not currently list “geography” on its editor’s checklist. See ASSOCIATED PRESS STYLEBOOK, *supra* note 147, at 367–68.

¹⁵⁰ See, e.g., SARAH HARRISON SMITH, THE FACT CHECKER’S BIBLE 112–14 (2004) (noting the wisdom of scrupulously fact-checking any “sensitive” or potentially libelous material as the process itself helps to avoid liability).

¹⁵¹ Cf. Spencer, *supra* note 43, at 115 (arguing that use of the Internet should give rise to a presumption of purposeful availment of the benefits of the state in which the injurious material was accessed; use of geographic-limiting technology would help the defendant rebut that presumption).

the concerns of the Due Process Clause and the First Amendment should remain separate. What, then, can be done to protect the individual publisher?

While it might seem like an unsatisfactory answer, the optimal protection comes from reform of the substantive law of libel. The Supreme Court has never clarified whether the constitutional protections of *New York Times Co. v. Sullivan* and *Gertz v. Robert Welch, Inc.* apply to non-media defendants. State courts are split on this matter, and thus it is still possible (if unlikely) that a non-media publisher being sued by a private plaintiff might be subject to strict liability for libel in some jurisdictions.¹⁵²

In the blogger's nightmare scenario, the blogger publishes a defamatory statement about a well-capitalized individual or corporation; the target of the libel then sues the blogger in a remote forum, using the prohibitive costs of litigation as a very real threat to silence the blogger's speech.¹⁵³ But the well-capitalized plaintiff with a vendetta—or a valid complaint—is unlikely to be deterred from pursuing an out-of-state defendant by a mere jurisdictional ruling; that plaintiff can simply re-file his claim against the blogger in his home state. The cost of litigating may be somewhat lessened for the defendant, but the threat of a judgment will be just as real. Only the substantive reform of libel law can reduce this threat.

Obviously, it is preferable for legislatively-mandated libel reform to take place before an individual publisher becomes the target of a highly motivated and well-capitalized plaintiff. State courts can also reform libel rules that inadequately protect the speech rights of the defendants who appear before them—for example, by using the opinion privilege to shield speech on matters of public concern.¹⁵⁴ But substantive libel reform will ultimately better protect individual publishers from liability than jurisdictional safeguards ever could.

IV. THE FIX: RETURN TO MINIMUM CONTACTS

The Internet has empowered uncivil discourse. No longer is it expensive or difficult for me to broadcast an injurious falsehood; I can simply blog, post on Facebook, send a mass e-mail, post a YouTube video, or join a chat room and find a potentially global audience for my libel. But there is no reason why the greater potential for harming reputations via the Internet should create a jurisdictional safe harbor for the tortfeasor. The tortfeasor's very resort to a

¹⁵² SACK & BARON, *supra* note 45, at 352–55; Lidsky, *supra* note 78, at 904–19 (discussing the uncertainties of First Amendment doctrine as applied to individual defendants).

¹⁵³ Cf. GODWIN, *supra* note 91, at 79–108 (describing a lawsuit filed by “the king” against blogger Brock Meeks); Lidsky, *supra* note 78, at 891–92 (describing how the American Civil Liberties Union and Electronic Frontier Foundation came to the rescue of individuals sued for defamation by U-Haul).

¹⁵⁴ Lidsky, *supra* note 78, at 932–44 (describing how the opinion privilege can be adapted to cyberspace and urging state courts not to wait for the Supreme Court to begin protecting individual publishers).

broad and powerful medium such as the Internet should not thereby insulate it from the broad and powerful jurisdictional rule that would apply if she had chosen a less powerful medium for her libel.¹⁵⁵ The Internet is a robust forum for speech and ought to remain such. Nevertheless, the reasons for enforcing civility rules in real space apply equally to cyberspace: defamation is damaging whether delivered via Internet, print, or broadcast.

The *Young* audience-targeting test has been influential in libel cases decided in jurisdictions far from the Fourth Circuit and North Carolina. Several courts have cited *Young* with approval and adopted the audience-targeting analysis,¹⁵⁶ or used the presumption of aimlessness to conclude that a Web site was targeted at a world-wide audience and therefore not at the forum state.¹⁵⁷ A few courts have declined to adopt the test, questioning whether it is consistent with *Calder*, or criticizing the presumption of aimlessness.¹⁵⁸ None of these courts have seriously questioned the effect of the test on the plaintiff's access to convenient and effective relief.¹⁵⁹

¹⁵⁵ Spencer, *supra* note 43, at 102.

¹⁵⁶ Shrader v. Biddinger, 633 F.3d 1235, 1241–46 (10th Cir. 2011) (adopting and applying the audience-targeting test from *Young*); Revell v. Lidov, 317 F.3d 467, 473 (5th Cir. 2002) (citing *Young* with approval); MLS Nat'l Med. Evaluation Servs., Inc. v. Templin, No. 10-14649, 2011 WL 1869918, at *6–8 (E.D. Mich. May 16, 2011) (applying the audience-targeting test from *Young*); Vision Media TV Group, LLC v. Forte, 724 F. Supp. 2d 1260, 1266 (S.D. Fla. 2010) (same); Gorman v. Jacobs, 597 F. Supp. 2d 541, 548–49 (E.D. Pa. 2009) (same); Lange v. Thompson, No. C08-0271MJP, 2008 WL 3200249, at *3 (W.D. Wash. Aug. 6, 2008) (same); Shirlington Limousine & Transp., Inc. v. San Diego Union-Tribune, 566 F. Supp. 2d 1, 6–7 (D.D.C. 2008) (adopting and applying the audience-targeting test from *Young*); Sunlight Saunas, Inc. v. Sundance Sauna, Inc., 427 F. Supp. 2d 1011, 1021 (D. Kan. 2006) (applying the audience-targeting test from *Young*); Gentle Wind Project v. Garvey, No. 04-103-P-C, 2005 WL 40064, at *8–10 (D. Me. Jan. 10, 2005) (same); Realuyo v. Villa Abrille, No. 01 Civ. 10158(JGK), 2003 WL 21537754, at *10 (S.D.N.Y. July 08, 2003) (same); Rios v. Ferguson, 978 A.2d 592, 598–99 (Conn. Super. Ct. 2008) (adopting an audience-targeting test).

¹⁵⁷ Revell, 317 F.3d at 475–76 (noting that “the post to the bulletin board here was presumably directed at the entire world”); Sunlight Saunas, 427 F. Supp. 2d at 1021 (noting that the Web site was not directed to an audience in Kansas anymore than it was to “users worldwide”); Lindgren v. GDT, LLC, 312 F. Supp. 2d 1125, 1131 (S.D. Iowa 2004) (reasoning that because defendant's Web site “could be accessed anywhere, including Iowa, its existence does not demonstrate an intent to purposefully target Iowa”).

¹⁵⁸ Internet Solutions Corp. v. Marshall, 39 So. 3d 1201, 1215 (Fla. 2010) (rejecting the presumption of aimlessness in the context of the Florida long-arm statute); Baldwin v. Fischer-Smith, 315 S.W.3d 389, 397 (Mo. Ct. App. 2010) (rejecting the premise of *Young*, that defendant must target the state, as inconsistent with the Supreme Court's opinion in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985)).

¹⁵⁹ The Connecticut courts have adopted an audience-targeting test, but in one case simply avoided the harsh outcome to the plaintiff that a strict application of the rule would have required. *Rios*, 978 A.2d at 598–600 (citing to an audience-targeting test but then finding jurisdiction over the defendant based on a video he posted on YouTube that targeted the plaintiff, a Connecticut resident, without finding that the video or the Web site targeted a Connecticut audience).

This Article has argued that the audience-targeting approach is yet another unsuccessful innovation in the judiciary's struggle with the jurisdictional implications of the Internet. The targeting test too narrowly restricts *Calder* and rests on an unjustified fear that the Internet will eviscerate the notion of sovereign boundaries implicit in the Due Process Clause. This Article therefore concludes by urging courts to abandon their innovations and return to the established framework of analysis for personal jurisdiction, messy and unpredictable though it may be. Courts that are not required to follow *Young* should not, and the courts that have adopted it should reconsider. Instead, they should apply traditional jurisdictional analysis (and stop reducing *Calder* to a three-part test), sensitive to the facts and circumstances of the defendant's behavior, to determine whether the defendant's contacts with the forum state are sufficient. Courts should also give serious consideration to the equities of finding jurisdiction, paying particular attention to the forum state's interest in adjudicating the suit, the plaintiff's interest in convenient and effective relief, and of course, the burden on the defendant of litigating in a remote forum.

Finally, because there are genuine First Amendment concerns implicated in a less restrictive jurisdictional test, a change in jurisdictional regimes should be accompanied by substantive reform of the libel laws to better protect the speech rights of individual Internet publishers. State legislatures can also clarify their stance on jurisdiction over libel claims by amending their long-arm statutes to reflect the level at which they desire to protect their citizens from defamation on the Internet.¹⁶⁰

¹⁶⁰ See Haynes, *supra* note 94, at 162-64.